Bludream City Development Sdn Bhd v Pembinaan Bina Bumi Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCC)(A)-2145–11 OF 2022
RAVINTHRAN, MARIANA YAHYA AND LIM CHONG FONG JJCA
6 MARCH 2024

Companies and Corporations — Winding up — Adjudication decision ('AD') — Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') — Whether failure to pay debt owing under AD was valid basis to wind up debtor — Whether court had jurisdiction/power to order winding up even though AD was decision of temporary finality — Whether although the CIPAA did not expressly provide for winding up as remedy to enforce an AD, it was permissible under s 31(2) the CIPAA as a remedy provided for under 'written law' (ie, Companies Act 2016) — Whether debtor was precluded from continuing to dispute AD debt in winding up proceedings using arguments already considered and dismissed in previous interlocutory proceedings

The appellant had engaged the respondent to carry out construction works in a building project. Because it failed to receive payment for work done, the respondent commenced adjudication proceedings against the appellant under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') and obtained an adjudication decision ('AD') requiring the appellant to pay it an adjudicated sum of RM5,510,197.91 together with interest and costs. The High Court (HC) dismissed the appellant's applications to set aside/stay the AD and allowed the respondent's application to enforce it. The Court of Appeal affirmed the HC's decisions. When the appellant failed to heed the respondent's demand to settle the adjudicated debt, the respondent filed a petition to wind up the appellant on the ground that it was unable to pay its debts. Between the time the AD was handed down and the winding up petition was filed, the appellant's architect, without the respondent's agreement, unilaterally revised the final accounts for the project and, based on that revision, issued a Valuation Report No 37 and an Interim Certificate No 37, which cumulatively had the effect of showing that the appellant did not owe the respondent any monies and that, instead, the respondent had been overpaid if damages for late completion and to rectify defective work done were to be taken into account. Aggrieved by the raising of these matters post the AD, the respondent referred them to arbitration. The appellant also cross-referred its dispute on the adjudicated amount to the same arbitration. The appellant opposed the winding up petition arguing that until the arbitration had been concluded, it could not be conclusively said that it owed the respondent any monies. The appellant said that it was wrong, and contrary to the legislative

intent of the CIPAA, to base a winding up petition on an AD, which was only a decision of temporary finality. In allowing the winding up petition, the HC held that the order to enforce the AD had turned the AD into an indisputable judgment debt which the appellant, by its failure to pay the same, had shown that it was commercially insolvent to pay. The court dismissed the appellant's arguments to oppose the petition, holding that they were an attempt to relitigate arguments that were already considered and dismissed by the courts when the enforcement/setting aside/stay proceedings concerning the AD and the appellant's application for a Fortuna injunction were heard. The court found that Valuation Report No 37 and Interim Certificate No 37 were issued to frustrate the respondent's claims and to avoid paying the debt payable under the AD. The instant appeal was against the HC's decision.

Held, unanimously dismissing the appeal:

(1) The court had jurisdiction and power to wind up the appellant for failure to pay the amount adjudicated under the AD. The suggestion that the court did not have such jurisdiction or power on the ground that the CIPAA did not expressly provide for winding up as a remedy to enforce an AD was not sustainable. Although not expressly provided for in the CIPAA, winding up was plainly permissible under s 31(2) the CIPAA as it was a remedy that was available under a 'written law', namely, under ss 465 and 466 of the Companies Act 2016 (see paras 43 & 36).

(2) Disputability of a debt had to be seen in its proper context. An unpaid debt adjudicated in a the CIPAA proceeding would be disputable if the non-paying party had prima facie established a bona fide dispute of the debt on substantial or reasonable grounds. But if the dispute had been adjudicated, resulting in an AD favouring the unpaid party, the debt would cease to be disputable in an ensuing winding up proceeding. This was because the disputed debt had been independently adjudicated by a neutral third party. More pertinently, it should not be open to the non-paying party to again dispute the debt when the sanctity of the AD had been preserved by the subsequent court orders refusing to set aside and/or stay as well as allowing enforcement of the AD as a judgment pursuant to ss 16, 27 and 28 of the CIPAA, respectively. Consequently, it was immaterial in the winding up court that the non-paying party still disputed the adjudicated debt and had referred the dispute to arbitration or to the court for final determination (see para 39).

(3) Although the court was mindful that winding up was a draconian procedure which might irreparably damage business and reputation, it had to heed the legislative objective of the CIPAA to alleviate the financial woes prevalent in the Malaysian construction industry (see para 40).

(4) The appellant was estopped from advancing the new disputes it had raised to oppose the winding up petition because they had been raised, considered and dismissed by the High Court as well as by the Court of Appeal when the applications for enforcement/setting aside/stay of the AD were considered and also when the appellant applied for the Fortuna injunction in the winding up proceedings. In any event, the court found that the appellant's new disputes lacked bona fides and were contrived to defeat the winding up petition (see paras 48–49).

(5) There was no reason to disturb the High Court's finding that the appellant was unable to pay its debts based on the financial information that was adduced in evidence. The appellant was no longer operational as admitted during the judgment debtor summons proceeding. Furthermore, there were minimum sums only maintained by the appellant in its banks that were garnishable. It was therefore plain that the appellant did not have cash flow solvency and that was sufficient to justify winding up based on s 465(1)(e) of the CA (see para 50).

(6) In view of the findings made in this case, this court was constrained to hold that the decisions in *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99 and *Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd* [2023] MLJU 628, relied upon by the appellant, were erroneously made. The Singapore cases of *Lim Poh Yeoh (Alias Lim Aster) v TS Ong Construction Pte Ltd* [2016] SGHC 179 which was later considered in *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] SGCA 61 (CA) were both distinguishable because of the absence of the equivalent of s 31(2) the CIPAA in the Singapore Building and Construction Security of Payment Act 2004. The other Singapore case of *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] SGCA 33; [2020] 1 SLR 1158 (CA) was plainly distinguishable by reason that there was no subsisting adjudication decision involved in the winding up proceeding (see para 42).

[Bahasa Malaysia summary

Perayu telah melantik responden untuk menjalankan kerja-kerja pembinaan dalam projek bangunan. Oleh kerana gagal menerima bayaran bagi kerja yang dilakukan, responden memulakan prosiding penghakiman terhadap perayu di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') dan memperoleh keputusan adjudikasi ('KA') yang memerlukan perayu membayar jumlah sebanyak RM5,510,197.91 berserta faedah dan kos. Mahkamah Tinggi ('MT') menolak permohonan perayu untuk mengenepikan/menggantung KA dan membenarkan permohonan responden untuk menguatkuasakannya. Mahkamah Rayuan ('MR') mengekalkan keputusan MT tersebut. Apabila perayu gagal mematuhi permintaan responden untuk menyelesaikan jumlah adjudikasi, responden memfailkan petisyen untuk menggulung perayu atas alasan tidak dapat membayar

hutangnya. Antara tempoh KA diberikan dan petisyen penggulungan difailkan, arkitek perayu, tanpa persetujuan responden, secara satu pihak meneliti semula akaun akhir untuk projek itu dan berdasarkan penelitian itu, mengeluarkan Laporan Penilaian No 37 dan Sijil Interim No 37, yang secara kumulatif mempunyai kesan yang menunjukkan bahawa perayu tidak berhutang dengan responden atas sebarang jumlah pembayaran. Sebaliknya, responden dikatakan telah terlebih bayar sekiranya ganti rugi lewat dan pembetulan kerja yang rosak diambil kira. Berikutan peningkatan perkara-perkara berbangkit selepas KA diberikan, responden merujuk perkara ini kepada timbang tara. Perayu juga merujuk silang pertikaiannya mengenai jumlah adjudikasi kepada timbang tara yang sama. Perayu membantah petisyen penggulungan dengan berhujah bahawa sehingga timbang tara selesai, perkara keberhutangan tersebut adalah tidak muktamad. Perayu menghujahkan bahawa adalah salah dan bertentangan dengan niat APAIP, untuk menggunakan petisyen penggulungan sebagai KA, yang hanya merupakan keputusan sementara. Dalam membenarkan petisyen penggulungan, MT berpendapat bahawa perintah untuk menguatkuasakan KA telah menjadikan KA sebagai hutang penghakiman yang tidak dapat dipertikaikan yang perayu, yang mana kegagalannya untuk membayar telah menunjukkan bahawa mereka tidak solven secara komersial. Mahkamah menolak hujah perayu untuk membantah petisyen itu dengan menyatakan bahawa ianya adalah percubaan untuk membuat litigasi semula mengenai hujahan yang telah dipertimbangkan dan ditolak oleh mahkamah apabila penguatkuasaan/pengenepian/penangguhan prosiding KA dan permohonan perayu untuk injunksi Fortuna didengar. Mahkamah mendapati bahawa Laporan Penilaian No 37 dan Sijil Interim No 37 dikeluarkan untuk menggagalkan tuntutan responden dan untuk mengelak daripada membayar hutang yang perlu dibayar di bawah KA. Rayuan ini adalah terhadap keputusan MT.

Diputuskan, sebulat suara menolak rayuan:

(1) Mahkamah mempunyai bidang kuasa untuk menggulung perayu kerana kegagalan membayar jumlah adjudikasi di bawah KA. Hujahan bahawa mahkamah tidak mempunyai bidang kuasa sedemikian atas alasan APAIP tidak secara jelas memperuntukkan penggulungan sebagai remedi untuk menguatkuasakan KA tidak boleh dipertahankan. Walaupun tidak diperuntukkan secara nyata di dalam APAIP, penggulungan adalah jelas dibenarkan menurut s 31(2) APAIP kerana ianya adalah remedi yang boleh didapati di bawah 'undang-undang bertulis', iaitu, di bawah ss 465 dan 466 Akta Syarikat 2016 (lihat perenggan 36 & 43).

(2) Pertikaian hutang perlu dilihat dalam konteks yang betul. Hutang yang belum dibayar yang diputuskan dalam prosiding APAIP boleh dipertikaikan sekiranya pihak yang tidak membayar secara prima facie mempertikaikan secara bona fide atas alasan yang serius atau munasabah.

Namun sekiranya pertikaian itu telah diadjudikasi dan menyebabkan KA memihak kepada pihak yang belum dibayar, hutang itu tidak boleh dipertikaikan di dalam prosiding penggulungan berikutnya. Hal ini kerana hutang yang dipertikaikan telah diadjudikasi secara bebas oleh pihak ketiga yang tidak menyebelahi mana-mana pihak. Lebih penting lagi, pihak yang tidak membayar tidak boleh dibenarkan untuk sekali lagi mempertikaikan hutang apabila keesahan KA telah dikekalkan oleh perintah mahkamah berikutnya yang tidak mengenepikan dan/atau menggantung serta membenarkan penguatkuasaan KA sebagai penghakiman menurut ss 16, 27 dan 28 APAIP. Oleh itu, mahkamah di prosiding penggulungan tidak akan melayani pihak yang tidak membayar yang masih mempertikaikan hutang adjudikasi dan telah merujuk pertikaian itu kepada timbang tara atau kepada mahkamah untuk penentuan akhir (lihat perenggan 39).

(3) Walaupun mahkamah sedar bahawa penggulungan adalah prosedur yang kejam yang mungkin menjejaskan perniagaan serta reputasi, objektif perundangan APAIP harus dipatuhi untuk mengurangkan masalah kewangan yang lazim dalam industri pembinaan Malaysia (lihat perenggan 40).

(4) Perayu dihalang daripada membangkitkan pertikaian baru untuk menentang petisyen penggulungan kerana ianya telah dipertikaikan, dipertimbangkan dan ditolak oleh Mahkamah Tinggi serta oleh Mahkamah Rayuan apabila permohonan penguatkuasaan/pengenepian/penangguhan KA dipertimbangkan dan apabila perayu memohon injunksi Fortuna dalam prosiding penggulungan. Dalam apa jua keadaan, mahkamah mendapati bahawa pertikaian baru perayu tidak dibuat secara bona fide dan bertujuan untuk menentang petisyen penggulungan (lihat perenggan 48–49).

(5) Tiada alasan untuk mengganggu dapatan Mahkamah Tinggi bahawa perayu tidak dapat membayar hutangnya berdasarkan maklumat kewangan di dalam keterangan. Perayu tidak lagi beroperasi seperti yang diakui semasa prosiding saman penghutang penghakiman. Tambahan pula, terdapat jumlah minimum yang disimpan oleh perayu di dalam akaun-akaun banknya yang boleh digarnishee. Oleh itu, adalah jelas bahawa aliran tunai perayu tidak solven dan hal itu cukup untuk mewajarkan penggulungan berdasarkan s 465(1)(e) AS (lihat perenggan 50).

(6) Mengambil kira penemuan di dalam kes ini, mahkamah ini terikat untuk mengekalkan keputusan kes *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99 dan *Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd* [2023] MLJU 628, yang dihujahkan oleh perayu sebagai keputusan secara salah. Kes Singapura *Lim Poh Yeoh (Alias Lim Aster) v TS Ong Construction Pte Ltd* [2016] SGHC 179 yang

kemudiannya dipertimbangkan di dalam kes *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] SGCA 61 (MR) yang mana kedua-duanya dapat dibezakan kerana ketiadaan peruntukan yang setara dengan s 31(2) APAIP dalam Singapore Building and Construction Security of Payment Act 2004. Satu lagi kes di Singapura iaitu *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] SGCA 33; [2020] 1 SLR 1158 (MR) jelas berbeza kerana tiada keputusan adjudikasi yang terlibat dengan prosiding penggulungan (lihat perenggan 42).]

Cases referred to

ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd [2021] 8 MLJ 99, HC (not folld)

Ahmad Zaki Sdn Bhd v Meor Hamzah (M) Sdn Bhd [2016] MLJU 1391, HC (refd)

AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co) [2020] SGCA 33; [2020] 1 SLR 1158, CA (distd)

Bank Pembangunan (M) Bhd v Elgi Marka Sdn Bhd [1998] 5 MLJ 504, HC (refd)

Barisan Performa Sdn Bhd v Hype Park City Sdn Bhd [2018] MLJU 10, HC (refd)

Bluedream City Development Sdn Bhd v Pembinaan Bina Bumi Sdn Bhd and another case [2021] 11 MLJ 641; [2021] CLJU 319, HC (refd)

Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of The Commonwealth of Australia [1978] VR 83, SC (refd)

G-Pile Sistem Sdn Bhd v CMMC Sdn Bhd and Anor [2021] MLJU 2694; [2021] 1 LNS 1727, HC (refd)

Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd [2021] SGCA 61, CA (distd)

Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817, CA (refd)

Pembinaan Purcon v Entertainment Village (M) Sdn Bhd [2004] 1 MLJ 545, HC (refd)

Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244; [2019] 3 CLJ 499, CA (refd)

Lim Poh Yeoh (Alias Lim Aster) v TS Ong Construction Pte Ltd [2016] SGHC 179, HC (distd)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187, CA (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

PECD Construction Sdn Bhd v Freehold Point Sdn Bhd [2015] 1 MLJcivp 186; [2008] 3 CLJ 215, HC (refd)

Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd [2023] MLJU 628, HC (not folld)

Sime Darby Energy Solution Sdn Bhd (formerly known as Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd [2022] 1 MLJ 458, CA (refd)

SME Majujaya Sdn Bhd v Oon Brothers Electrical Trading Co Sdn Bhd [2018] MLJU 899, HC (refd)

Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (refd)

Legislation referred to

Building and Construction Security of Payment Act 2004 [SG]

Companies Act 2016 ss 465, 465(1)(e), 466, 466(1)(a)

Construction Industry Payment and Adjudication Act 2012 ss 16, 27, 28, 28(1), 30, 31(2)

Appeal from: Companies (Winding-up) No BA-28NCC-454–09 of 2022 (High Court, Shah Alam)

Sanjay Mohan (with Wong Li-Wei and Tan Jia Shen) (Sanjay Mohan) for the appellant.

Rohan Arasoo Jeyabalah (with Amy Hiew Kar Yi, Pan Yan Teng and Lim Ren Wei) (Harold & Lam Partnership) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an appeal against the decision to wind up a company based on non-payment ordered by an adjudication decision made under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

[2] The appellant here (respondent in the High Court) is the developer of a service apartment located at the Mines Resort City, Selangor ('project').

[3] The respondent here (petitioner in the High Court) is the construction works contractor engaged by the appellant to construct and complete the building and infrastructure works of the project.

[4] We heard the appeal on 24 November 2023 and thereafter reserved our decision to deliberate on the submissions advanced by the parties.

[5] Having so duly deliberated, we provide below our decision together with the supporting grounds thereof.

BACKGROUND

[6] The respondent on 17 July 2019 initiated the CIPAA adjudication proceeding against the appellant for unpaid Interim Certificate No 4R for work done in the project amounting to RM5,510,197.91.

[7] After having gone through the adjudication proceeding, the adjudicator on 4 February 2020 made his decision ('decision') in favour of the respondent by ordering, amongst others:

(a) pay the respondent the sum of RM5,510,197.91 ('adjudicated amount');

(b) pay the respondent simple interest on the adjudicated amount at the rate 5%pa from 9 July 2019 until the adjudicated amount is paid; and

(c) pay the respondent the costs of adjudication proceeding of RM61,289.

[8] Consequently, the appellant on 4 March 2020 instituted Shah Alam High Court Originating Summons No BA-24C-27–03 of 2020 to set aside the decision.

[9] The appellant also in the same proceeding applied to stay the decision.

[10] The respondent thereafter on 11 August 2020 also instituted Shah Alam High Court Originating Summons No BA-24C-76–08 of 2020 to enforce the decision.

[11] On 13 August 2020, the appellant's architect issued Valuation Report No 37, Interim Certificate No 37 and revised statement of final account. The respondent was aggrieved and accordingly on 26 August 2020 commenced arbitration proceeding to have the dispute on Interim Certificate No 37 and revised statement of final account referred to arbitration. The appellant cross referred its dispute on the final determination of the decision to the same arbitration.

[12] The High Court on 10 December 2020 dismissed the appellant's setting aside application as well as stay application and allowed the respondent's enforcement application: see *Bluedream City Development Sdn Bhd v Pembinaan Bina Bumi Sdn Bhd and another case* [2021] 11 MLJ 641; [2021] CLJU 319.

[13] The appellant appealed to the Court of Appeal against the decisions of the High Court but they were subsequently all dismissed on 19 May 2022.

[14] The appellant thereafter sought for leave to appeal to the Federal Court against the decisions of the Court of Appeal but the appellant's application was also dismissed on 20 October 2022.

[15] In the meantime, upon the High Court having made the decisions as stated in para [12] above, the respondent on 24 August 2021 served on the appellant a statutory notice pursuant to ss 465(1)(e) and 466(1)(a) of the Companies Act 2016 demanding for payment of the sum of RM6,175,669.10 premised on the decision. The appellant however neglected to satisfy or pay the debt or any part thereof.

IN THE HIGH COURT

[16] The unpaid respondent hence on 23 September 2021 instituted Shah Alam High Court Winding Up Petition No BA-NCC-454–09 of 2021 ('petition') to wind up the appellant.

[17] As a result, the appellant applied to strike out the petition, but that application was dismissed on 21 October 2021.

[18] Subsequently, the appellant made another interlocutory application in the winding up proceeding to seek a Fortuna injunction to restrain the respondent from continuing with the winding up proceeding against the appellant but that application was also dismissed on 7 December 2021.

[19] Finally, the petition was heard and accordingly allowed on 15 November 2022 with costs of RM8,000 to be paid out to the respondent from the assets of the appellant ('judgment').

[20] The learned judge held, amongst others, as follows in his well written grounds of judgment with emphasis added by us:

> [5] The respondent alleged that the debt on a decision pursuant to the CIPAA 2012 which is only of temporary finality and the alleged debt is currently being contested in the arbitration proceeding.
>
> [6] There can be no hesitation that adjudication decision has been enforced as a court judgment/order and the debt demanded in the s 466 notice is based on the enforcement order.
>
> [7] In relation to the above, one must also not lose sight the case of *Bumimetro Construction Sdn Bhd Mayland Universal Sdn Bhd and another appeal* [2017] MLJU 2245, where Lee Swee Seng J (as he then was) held as follows:
>
> > [34] Statutory adjudication referred under the CIPAA does not require the agreement of the parties to commence the process and prevails over the parties' agreement to arbitrate in that arbitration cannot stand in the way of statutory

adjudication and neither can it stultify or have the effect of automatically staying an adjudication decision until the arbitral award is delivered.

[66] Whilst the adjudication decision has the element and effect of temporary or interim finality, it does not mean that it is denuded and devoid of any effect unless of course a stay of the adjudication decision is granted.

[67] Its binding effect cannot be ignored and it is precisely because of that, Parliament had allowed a party in whose favour an adjudication decision is given to be able to proceed to exercise the remedies available to it under the CIPAA.

...

[71] If it is a case where the debt pursuant to an adjudication decision could still be bona fide disputed, then Parliament would not have stated in s 13 that the adjudication decision is binding or in s 30(1) 'If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount ...' A party against whom an adjudication decision is made is expected to make payments even before the enforcement of the adjudication decision under s 28 of the CIPAA. In the present case there is no application by Mayland to set aside the adjudication decision; only an application for stay of the adjudication decision that has been dismissed. There is no good ground to grant a Fortuna injunction here as the debt in the adjudicated decision cannot be seriously disputed until that that decision is set aside or stayed.

...

[9] *Hence, based on the above authority, the debt which is premised on a decision pursuant to the CIPAA 2012 pursuant to an enforcement order is a judgment debt. To reiterate, the Shah Alam High Court had allowed the petitioner's application to enforce the adjudication decision and the respondent's application to set aside and stay the adjudication decision had been dismissed by the High Court. Furthermore, the Court of Appeal had unanimously dismissed the respondent appeal and had upheld the decision of the Shah Alam High Court. Thus, the respondent's argument that the adjudication decision is of temporary finality and the filing of the winding up petition which is solely done to prevent the respondent from pursuing its counterclaim in the ongoing arbitration proceeding is devoid of any merits*.

...

[17] The respondent also alleged that based on the alleged revised final account, Valuation Report No 37 and Interim Certificate No 37 there is no sum due and owing by the respondent to the petitioner and instead, there is overpayment to the petitioner. To me, this cannot be true.

[18] The Valuation Report No 37 and the Progress Certificate No 37 were based on the revised final account issued by the project architect on 13 August 2020, which was never agreed to by the petitioner. The revised final account was unilaterally issued by the architect to further reduce the final contract sum, which was previously certified in the statement of final account dated 25 February 2020 and received by the petitioner on 5 March 2020 ('final account'). To date, no reason was given by the architect and/or the respondent for the said revision to the final contract sum.

A [19] It must be highlighted that both the final account and revised final account were issued:

(a) after the petitioner initiated adjudication proceeding pursuant to the CIPAA 2102 against the respondent for outstanding payment under Progress Certificate No 4R, on 17 July 2019; and

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(b) after the learned adjudicator delivered the adjudication decision in favour of the petitioner on 4 February 2020.

[20] *In short, the Valuation Report No 37 and Interim Certificate No 37 were therefore issued with the intention to frustrate the petitioner's claims and to avoid making* C *payment of the outstanding sum to the petitioner for work done under the contract*.

[21] *Upon, receipt of the revised final account, the petitioner then issued the notice of reference to arbitration dated 26 August 2020 to the petitioner on 28 August 2020 to refer the disputes between the parties under the contract to arbitration*.

[22] *In any event, these same arguments have been raised by the respondent in the* D *enforcement/setting aside/stay proceedings, which were rejected by the Shah Alam High Court. These contentions were also raised during the injunction application, which was dismissed by this honourable court. Consequently, the grounds raised by the respondent in opposing the petition, must certainly fail*.

[23] *As said, the judgment debt is an undisputable debt. Even though the respondent is* E *fully aware of the enforcement order, the respondent has failed to settle the debt to the petitioner. This only goes to shows that the debt due and owing to the petitioner was not been disputed by the respondent*.

[24] *The failure on the part of the respondent to pay the amount due to the petitioner trigger the presumption that the respondent is unable to pay its debt. The presumption is,* F *however, rebuttable*. The onus shift onto the respondent to show that it is able to pay the debt (see the case of *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1998] 7 MLJ 270; [1998] 4 CLJ Supp 437).

[25] *The winding up petition presented by the petitioner is based on an undisputable debt pursuant to an enforcement order. Reference by the petitioner of its claim of* G *RM5,510,197.91 in arbitration does not mean that the debt is still being disputed as alleged by the respondent. Hence, I am satisfied that the respondent has failed to rebut the presumption of insolvency*.

[26] The respondent further argued that the filing of the winding up petition is for a collateral purpose of avoiding arbitration and to prevent the respondent from H pursuing its counterclaim in the arbitration.

[27] *To me, the petitioner as a creditor who is not paid has a right to file a petition for winding up, whatever the motives may be. The court is concerned about the motives of the petitioner here in winding up the respondent*.

[28] This was the approach of Supreme Court in *Morgan Guaranty Trust Co of New* I *York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 which appear at p 96 where the court through the judgment of Hashim Yeop Sani CJ (as he then was) said:

> [1] The petition should not have been struck out in limine and should have been heard on its merit. Prima facie a creditor who has not been paid has a right to file a petition for a winding up order whatever might be his motives.

[29] *Moving on to the issue of whether respondent is commercially a solvent company, it is crystal clear that even if the respondent has sufficient assets or funds to pay back the debts, that does not mean they are commercially solvent. The respondent may be wealthy and at the same time insolvent.*

[30] *In deciding the respondent's solvency, it is trite law that even though a company may possess of wealth in the form of investment or assets not presently realizable to met its current liabilities, the company is legally commercially insolvent and may be wound up* (see the Supreme Court decision in *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ Rep 303). *The test of solvency is one of cash flow solvency, not balance sheet solvency.*

[31] In *Pengkalen Holiday Resort Sdn Bhd v Perbadanan Pengurusan Paradise Lagoon & Anor* [2016] MLJU 939; [2016] 1 LNS 1114, the court held as follows:

> [48] It is, in any event, now settled law that the issue on the inability to pay debt is to be considered in commercial context, which is the neglect to pay current demands regardless of whether the debtor is in possession of assets which, if realized would permit it to discharge its liabilities. The test of commercial insolvency simply means that the respondent company is not able to meet current debts when they fall due (see *System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd* [1999] MLJU 55; [1999] 1 LNS 79; [1999] 1 AMR 1187). This is why it has been said that a company could be both insolvent but wealthy at the same time (see, for example, the Privy Council decision in *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53; [1980] 1 LNS 44 and the Supreme Court decision in *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ 637). It is wholly insufficient that the assets might be realizable at some future date after the debts have become due and payable (see the Supreme Court decision in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449; [1988] 1 LNS 44).

[32] *In view of the above authorities, I find the respondent has failed to adduce sufficient or credible evidence to show that the respondent is commercially solvent, financially fit and capable of paying its debts to the petitioner.*

[33] *To prove the respondent has ability to pay its debts and so rebut the presumption of its ability, the respondent had produced the summary financial information which is a documented printed out from the Companies Commission of Malaysia which relate to the respondent financial year end 2018 which is not the latest and true financial figure. The respondent's excuse that its accounting software or system has been corrupted is unacceptable and merely an afterthought.*

[34] Finally, the respondent claims that it has a counterclaim and/or set off against the petitioner in the arbitration proceedings amounting to a total of RM1,780,805.83 being overpayment to the petitioner (RM280,805.83) and liquidated damages (RM1.5m). But these claims (which is less than the judgment debt sum) is yet to be proved, whereas, the petitioner here has obtained a valid adjudication decision and enforcement order against the respondent. Until the counterclaim(s) have been determined and crystalised, it ought not to form a valid basis to oppose the petition.

[21] Dissatisfied with the judgment, the appellant has on 15 November 2022 lodged its appeal to the Court of Appeal.

FINDINGS OF THIS COURT

[22] Before us, the appellant broadly contended that a party who has successfully obtained an enforced adjudication decision cannot proceed to rely on the adjudication decision to commence winding up proceeding when the adjudicated dispute has been referred for final determination either by arbitration or the court. This is premised upon there being no express provision provided in the CIPAA as well as depriving the appellant of its right to be heard in arbitration. Since the status of an adjudication decision is that of temporary finality only, the right to wind up a company based on the decision is contrary to the legislative intent of the CIPAA. Otherwise the company would be wound-up based on an adjudication decision that has permanency from which the company cannot recover.

[23] Arbitration proceeding has been commenced against the respondent by the appellant on its crossclaims based on the revised final valuation of the completed works, remediation of defective work and liquidated damages for late completion. These crossclaims extinguish the respondent's adjudicated claim allowed in the adjudication decision leaving a net sum of RM1,939,987.83 payable to the appellant.

[24] In the premises, the winding up of the appellant as ordered by the High Court is wrong.

[25] The respondent in retort contended it is trite that the appellant may be wound up based on a the CIPAA adjudication decision particularly based on the case of *Sime Darby Energy Solution Sdn Bhd (formerly known as Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd* [2022] 1 MLJ 458 (CA).

[26] Based on the facts and circumstances of the case as adduced by the parties, the appellant failed to pay against an indisputable debt that was determined in the decision; hence the appellant was correctly wound-up by the High Court.

[27] Our function here as an appellate court is that of review and this has been succinctly explained by Abdoolcader J (later FCJ) in *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 as follows with emphasis added by us:

> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well settled principles. *An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that*

the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v Johnston* [1942] AC 130 (at p 148), per Lord Wright). The Privy Council held in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228; [1964] 1 LNS 237 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1937] AC 473.

The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett v James* [1978] AC 297 (at pp 317, 326). For good measure, we would refer to the felicitous expression of Goulding J, in *Re Reed (a debtor)* [1979] 2 All ER 22, on this point (at p 25):

> *... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at*.

Furthermore, Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 (FC) held as follows with emphasis added by us:

> [148] Given the aforesaid, we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. *As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts*.

[28] Since this is a company winding up appeal, it is apt that we reproduce ss 465 and 466 of the Companies Act 2016 ('the CA') which reads:

> 465 Circumstances in which company may be wound up by Court
>
> (1) The Court may order the winding up if —
>
> (a) the company has by special resolution resolved that the company is to be wound up by the Court;
>
> (b) the company defaults in lodging the statutory declaration under subsection 190(3);

(c) the company does not commence business within a year from its incorporation or suspends its business for a whole year;

(d) the company has no member;

(e) the company is unable to pay its debts;

(f) the directors have acted in the affairs of the company in the directors' own interests rather than in the interests of the members as a whole or acted in any other manner which appears to be unfair or unjust to members;

(g) when the period, if any, fixed for the duration of the company by the constitution expires or the event, if any, occurs on the occurrence of which the constitution provide that the company is to be dissolved;

(h) the Court is of the opinion that it is just and equitable that the company be wound up;

(i) the company has held a licence under the Financial Services Act 2013 or the Islamic Financial Services Act 2013, and that the licence has been revoked or surrendered;

(j) the company has carried on a licensed business without being duly licensed or the company has accepted, received or taken deposits in Malaysia, in contravention of the Financial Services Act 2013 or the Islamic Financial Services Act 2013, as the case may be;

(k) the company is being used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public interest, public order, good order or morality in Malaysia; or

(l) the Minister has made a declaration under section 590.

(2) For the purpose of winding up actions commenced by the Registrar under paragraph (1)(k), the finding of the Registrar that a company is being used for unlawful purposes or any purpose prejudicial to national security or public interest or incompatible with peace, welfare, public order, security, good order or morality in Malaysia shall in all Courts and by all persons having power to take evidence for the purposes of this Act, be received as prima facie evidence until proven otherwise.

466 Inability to pay debts

(1) A company shall be deemed to be unable to pay its debts if —

(a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

(2) A petition to wind up a company shall be filed in the Court within six months from the expiry date of the notice of demand issued under paragraph (1)(a).

[29] It is plain that the respondent proceeded to commence winding up of the appellant based on ss 465(1)(e) and 466(1)(a) of the CA by reason of the unpaid adjudication decision that has been enforced by the High Court pursuant to s 28 of the CIPAA.

[30] Generally, the law on winding up based on inability to pay debts has been comprehensively explained in *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817 (CA) where Jeffery Tan JCA (later FCJ) held as follows with emphasis added by us:

[6] *Before we proceed to answer those questions, we should perhaps say that 'a creditor is not required to obtain a judgment before serving a statutory demand* ...' (Andrew R Keay, *The Law of Company Liquidation* (4th Ed) at p 83) and 'whether or not judgment had been obtained, an unpaid creditor is, as a general rule, entitled to a winding up order against a company which is insolvent' (Andrew R Keay, *The Law of Company Liquidation* (4th Ed) at p 91). *Where there is no judgment, it is not uncommon for companies to argue that the debt is disputed. But in order to oppose a winding up petition, the respondent must raise a bona fide dispute in both a subjective and objective sense. It must be honestly believed to exist and must be based on substantial or reasonable grounds. BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd* [2001] 1 MLJ 356; [2001] 1 CLJ 591 (Chan & Koh, *Malaysian Company Law* (2nd Ed) at para 22.145).

[7] In *BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd*, the respondent opposed the winding up petition on the ground that it had a cross-claim or set-off against the petitioner for defective works. The respondent also produced letters from its bankers to substantiate that it was solvent and had the means to settle the claim of the petitioner. On what constitutes a bona fide dispute, the court first surveyed the law and then summarised it as follows:

The respondent's point of view is that a dispute automatically arises whenever there are opposing assertions. Perhaps it is true, that whenever there are opposing assertions, there is no agreement on the matters diametrically asserted. Perhaps, in that sense of argument, debate or controversy, it is true that there is dispute whenever there are opposing assertions. But it is patently not true that a bona fide dispute automatically arises whenever there are opposing assertions. For whether or not there is a bona fide dispute wholly depends upon the evidence (see *Chip Yew Brick Works Sdn Bhd v*

Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447; [1988] 1 CLJ 5). 'The debt must be disputed on some substantial grounds' (*Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 at p 97; [1991] 1 CLJ 260; [1991] 1 CLJ Rep 317 , per Hashim Yeop A Sani CJ). The facts must indicate that there is a substantial dispute (*Re Nima Travel Sdn Bhd* [1986] 2 MLJ 374 at p 376; [1984] 1 LNS 162). '... it is not sufficient ... to say 'we dispute the claim'. (The respondent) must bring forward a prima facie case which satisfies the court that there is something to be tried, either before the court itself, or in an action, or by some other proceeding' (*Re Great Britain Mutual Life Assurance Society* [1880] 16 Ch D 246, at p 253 per Jessel MR). Dispute means not just differences arising out of a party's refusal to do something but controversy over contestable matters. Mere refusal to pay is not a dispute. See the cases of *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177; [1984] 1 LNS 166 and *KSM Insurance v Ong Ah Ba & Anor* [1986] 1 MLJ 237; [1984] 1 LNS 147, both decisions by George J, (as he then was) (*Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mills Sdn Bhd* [1991] 3 MLJ 309; [1991] 3 CLJ 2400; [1991] 1 CLJ Rep 362, per Hashim Yeop A Sani CJ, and cited in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (T/A Juta Bena)* [1995] 3 MLJ 273; [1996] 1 CLJ 231, 236). 'The dispute must be bona fide in both a subjective and objective sense. Thus it must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous and which the court should therefore ignore' (Palmer's, *Company Law* (23 Ed) p 1117; see also *Salak Park Development Sdn Bhd v Fajar Menyensing Sdn Bhd* [1994] MLJU 421; [1994] 4 CLJ 580). To just say 'we dispute the claim', is most definitely not enough.

[8] *Obviously a bare allegation by the company that a dispute exists cannot be allowed to deprive a creditor of the remedy which the statute confers on her or him ... It is, of course, impossible to predict in advance precisely what will constitute a 'substantial' ground but a suggested test is that there must be 'so much doubt and question about the liability to pay the debt as that the court see there is a question to be decided' or in the words of Sir George Jessel, the duty of a company to 'bring forward a prima facie case which satisfies the court that there is something to be tried' ... Whether there is in fact ground for the dispute depends upon the evidence* ... (Andrew R Keay, *The Law of Company Liquidation* (4th Ed) at p 99). 'Where there is a bona fide dispute as to the debt, the company cannot be said to have neglected to pay on a statutory notice' (Palmer's, *Company Law* (23rd Ed) at p 1117), and a petition based on a debt which is disputed on substantial grounds will fail (see *Kumagai Gumi Co v Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 2 MLJ 789; [1994] 1 LNS 279). '*Where the company disputes the debt in good faith and on reasonable grounds, the court will not make a winding up order ... (However) It is not satisfactory for the company simply to claim that it has a defence to the creditor's claim; it must show that it has a viable defence in law and produce prima facie proof of the facts to which it relies ... If there is no genuine dispute the court will make an order*' (Bailey, Groves and Smith, *Corporate Insolvency Law and Practice* (2nd Ed) at 7.97).

[9] *The making of a winding up order is not entirely a discretionary matter once a debt is established and not satisfied. 'One does not like to say positively that no case could occur in which it would be right to refuse it, but ordinarily speaking, it is the duty of the court*

to direct a winding up' (Bowes v Hope Life Insurance Society Ltd [1865] 11 HLC 389 per Lord Cranworth). There is however authority for the proposition that Lord Cranworth's principle had been too widely stated (see Andrew R Keay, *The Law of Company Liquidation* (4th Ed) at p 92). Since our s 218 provides that the court 'may order a winding up of a company', the discretion whether to make an order for winding up lies with the court. Such discretion is however not unbridled. In *Genting Sanyen Industrial Paper Sdn Bhd v WWL Corrugators Sdn Bhd* [2000] 5 MLJ 33; [2000] 1 CLJ 27, Clement Skinner JC, as he then was, balanced the two sides as follows:

> The submission that there is an overriding discretion reposed in the court is well supported by authority because whilst it is accepted that as between a creditor and a company as his debtor, the creditor who proves insolvency is prima facie entitled to a winding up order, (see the judgment of Buckley J at p 331 in *Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327) there are numerous cases, both local and Commonwealth, in which the overriding discretion of the court to refuse a winding up is recognised, (see *Kim Wah Theatre Sdn Bhd v Fuhlum Development Sdn Bhd* [1990] 2 MLJ 511; [1990] 1 LNS 42*Cetico Sdn Bhd v The Tropical Veneer Co Bhd* [1988] 2 MLJ 665b; [1987] CLJ 511; *Re P & J Macrae Ltd* [1961] 1 All ER 302).
>
> *However … the overriding discretion of the court, like any other judicial discretion, is fairly strictly regulated and is exercised in accordance with principles that are well defined. Counsel referred to The Law of Company Liquidation, 3rd edition by J O' Donovan at p 61 where the author discusses the discretion of the court in these terms*:
>
> > *Its power to refuse an order is, however, fairly strictly regulated and is exercised in accordance with principles that are relatively well defined. There are, in fact, certainly no more than five, and probably only four, reasons which will justify the court in refusing to make an order on the application of an unpaid creditor*.
>
> *These are: (a) the applicant's debt amounts to less than $1,000; (b) the debt is bona fide disputed by the company; (c) the company has paid or tendered payment of applicant's debt; and (d) winding up is opposed by other creditors*.

Moreover, in *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 (CA), Gopal Sri Ram JCA (later FCJ) held as follows also with emphasis added by us:

> *But a petition for winding up is not execution. For a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due*. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Companies Act. But the issuance of such a notice is not a sine quo non for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due.

See also *Bank Pembangunan (M) Bhd v Elgi Marka Sdn Bhd* [1998] 5 MLJ 504.

[31] Although the principles on winding up of a company for inability to pay debts are trite, the ultimate decision whether to wind up the company is fact centric depending on the circumstances of each case.

[32] This is a case of winding up of the appellant based on unpaid monies pursuant to an adjudicated decision made under the CIPAA and after the decision has been ordered to be enforced as a judgment of the court pursuant to s 28(1) of the CIPAA.

[33] In *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244; [2019] 3 CLJ 499 (CA), Abang Iskandar JCA (now PCA) held as follows with emphasis added by us:

> [17] *Again, prima facie, a creditor who is not paid, has a right to file a petition to wind up the debtor company. That appears to be the law*. In this regard, the case of *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95; [1991] 1 CLJ 260; [1991] 1 CLJ Rep 317 ('the *Morgan Guaranty Trust* case') in our view deserved mention. Briefly, the relevant facts in this *Morgan Guaranty Trust* case are as follows. the petitioner had demanded a sum of $33,323,593.91 from the respondent but the respondent had failed or refused or neglected to pay the said sum. the petition for winding up also relied on the profit and loss account of the respondent company which showed that liabilities exceed assets and that the respondent company had incurred a loss, and also on just and equitable grounds that the company should be wound up. The respondent company filed a notice of motion seeking that the winding up petition be set aside on the grounds that the petitioner was not entitled to present the petition and that the petition did not disclose a cause of action. The learned trial judge set aside the petition on the sole ground that in his view the petitioner had no locus standi to present the petition (see [1990] 1 MLJ 282). He stated that he was 'far from satisfied that the petitioner was at the material time qualified to petition the court as it did'. The learned judge took the view that the demand for payment was stage-managed and he also referred to a sharing formula agreed to by the creditors of the company which he regarded as a moratorium of the claims against the company.
>
> [18] On appeal against the High Court's decision, and in the course of his judgement in the *Morgan Guaranty Trust* case, Hashim Yeop Sani CJ (Malaya) had proceeded to say the following:
>
> > There are many tests to be applied to see whether a petitioner for a winding up order has locus standi. Insolvency is always a ground relied on in a petition. Prima facie an unpaid creditor is entitled to petition for a winding up order against a company which fails to pay its debt. Macpherson says that the only test which seems capable of resolving all difficulties is that suggested by Crossman J in *Re North Bucks Furniture Depositories Ltd*, namely, that the term 'creditor' 'includes every person who has the right to prove in winding up'.
>
> [19] Indeed, the learned justices of the Supreme Court in the *Morgan Guaranty Trust* case went on to say that the learned trial judge was wrong to have struck out

the petition in limine when instead it should have been heard on its merits. The appeal was allowed.

[20] *Now, compared to the situation obtaining in the instant appeal before us, it was worthy of note that the debt which was the central factum of the petition had been subjected to a mutually agreed specialised litigation between the parties, albeit by way of an adjudication proceeding which had resulted in a decision by the adjudicator* dated 31 December 2016. That adjudication decision in favour of the respondent petitioner had thereby evinced the fact that an amount as stated in the said adjudication decision was due and owing to the respondent from the appellant. *There was no application by the appellant to set aside the said adjudication decision. In the premises, we were of the view that such an adjudication decision was good and proper as a basis upon which a winding up petition notice against the appellant may be filed for a debt in the amount, as stated in the said adjudication decision against the appellant. Armed with an adjudication decision, as it were, the respondent petitioner in the instant case stands on a stronger footing than a petitioner*, say in the *NCK Wire Products Sdn Bhd* case. *As such, we were inclined to agree with the proposition that, for the purpose of filing a notice to wind up under s 465 of the Companies Act 2016, a successful litigant in an adjudication proceeding need not have to register the said adjudication decision under s 28 of the CIPAA*. As was stated with clarity by the Supreme Court Justices in the *Morgan Guaranty Trust* case having approved of Crossman J decision in *Re North Bucks Furniture Depositories Ltd*, namely, that the term 'creditor' 'includes every person who has the right to prove in winding up'. *It is without doubt that the respondent petitioner was a creditor to whom the appellant had been adjudicated to have owed monies to. And, prima facie, a creditor who is not paid, has a right to file a petition to wind up the debtor company*.

[21] *Also, we were of the view that s 31 of the CIPAA can be invoked by a successful party. There is nothing in the language employed in both ss 28 and 31 of the CIPAA which would liberally suggest that s 31 is subject to s 28 therein. One thing is conspicuous. There is no specific reference made by either of the sections to each other. In fact s 31(2) expressly provides that 'remedies provided by the CIPAA are without prejudice to other remedies available in the construction contract or any written law …' So, it is in addition to s 28, not in derogation thereto*.

[22] As such, we were of the view that the winding up petition was not premature, contrary to what was contended by learned counsel for the appellant before us.

[34] Recently in *Sime Darby Energy Solution Sdn Bhd (formerly known as Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd* [2022] 1 MLJ 458, Gunalan Muniandy JCA held as follows with emphasis added by us:

[57] Before us, having reviewed the authorities and principles relating to the CIPAA's objectives and the parties' respective contentions, the central question was whether the LJC had failed to properly and sufficiently appreciate and understand the objectives of the CIPAA in granting the FI in this case. *We have given due regard to the fact that there was genuine debt owing to the appellant based on an AD that was in law binding and enforceable, including by recourse to winding up proceedings*. The respondent wäs amply shown to be not capable of settling the judgment debt upon service of the 466 statutory notice.

A ...

[59] In the circumstances, our decision would be that the LJC erred in principle in filing to consider or correctly apply established principles and criteria of a proven judgment debt based on AD contrary to the object and intention of the CIPAA for expeditious payments of proven construction claims. *In our view, the LJC was*
B *plainly wrong in failing to strictly apply the principle expressly pronounced in Likas Bay on the basic premise of the right of the respondent as losing party in the adjudication proceeding to pursue court action or arbitration that may eventually prevail over or reverse the AD. This is an uncertain event that should not be used to preclude that statutory right of the appellant to pursue winding up action*.

C

[35] The law on winding up a company based on an adjudication decision has thus already been adequately settled by this court. The crux of it is the unpaid successful party who obtained the adjudication decision may opt to wind up the non-paying party.

D

[36] That notwithstanding, the appellant implored us that there is nowhere in the CIPAA that expressly provided for winding up as a remedy to enforce an adjudication decision unlike other remedies expressly prescribed in ss 28 to 30
E of the CIPAA. In other words, it is suggested that the court either has no jurisdiction or power to wind up the company. We are however of the view that albeit not so expressly provided in the CIPAA, winding up is plainly permissible as expressly stated in s 31(2) of the CIPAA if the remedy is available in a written law. The remedy of winding up of the company for inability to pay
F debts is plainly provided in ss 465 and 466 of the CA. As a matter of fact, this has already been dealt with in *Likas Bay Precinct* and there is nothing *per incuriam* in our view.

[37] Be that as it may, the appellant further implored us that the decision is
G still disputable and that the appellant has referred the dispute to arbitration. The decision in the circumstances only enjoyed temporary finality. Consequently, the appellant should not be wound up and reliance has been made on the cases of *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99 and *Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd*
H [2023] MLJU 628. Additionally, the appellant relied on the Singapore cases of *Lim Poh Yeoh (Alias Lim Aster) v TS Ong Construction Pte Ltd* [2016] SGHC 179 and *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] SGCA 33; [2020] 1 SLR 1158 (CA).

I **[38]** It is trite and plain that a company may be wound-up on the ground of inability to pay debts albeit the payment sought is not a judgment debt: see *PECD Construction Sdn Bhd v Freehold Point Sdn Bhd* [2015] 1 MLJcivp 186; [2008] 3 CLJ 215. This is commonly done for debt premised on unpaid invoices and thereafter upon the service of notice which invokes the statutory

presumption accorded by s 466(1)(a) of the CA. In such instances, it is also common that the non-paying party will seek a Fortuna injunction to restrain the commencement or continuation of the winding up proceeding. If it is established there is a bona fide dispute on the alleged debt on substantial or reasonable grounds, either the Fortuna injunction will be granted, see *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817 or the winding up proceeding will be struck out: see *Pembinaan Purcon v Entertainment Village (M) Sdn Bhd* [2004] 1 MLJ 545.

[39] For winding up proceeding based on unpaid construction payment debts arising after the advent of the CIPAA particularly where the debt is based on an adjudicated decision, it is our view critical to properly understand the notion of disputability of the debt. Put in another way, disputability must be seen in its proper context. In this regard, we hold that an unpaid debt unadjudicated in a the CIPAA proceeding will be disputable if the non-paying party has prima facie established a bona fide dispute of the debt on substantial or reasonable grounds. However, if the dispute on the debt has been adjudicated which resulted in an adjudication decision obtained in favour of the unpaid party, the debt ceases to be disputable in an ensuing winding up proceeding. This is because the disputed debt has been independently adjudicated by a neutral third party. More pertinently, it should not be open to the non-paying party to again dispute the debt when the sanctity of the adjudication decision has been preserved by the subsequent court orders refusing to set aside and/or stay as well as allowing enforcement of the adjudication decision as a judgment pursuant to ss 16, 27 and 28 of the CIPAA respectively. Consequently, it is immaterial in the winding up court that the non-paying still disputes the adjudicated debt and has referred the dispute to arbitration or the court for final determination: see *Barisan Performa Sdn Bhd v Hype Park City Sdn Bhd* [2018] MLJU 10. The disputability of the dispute can only be done in the arbitration or the court to enable the parties to finally re-contest the dispute *de novo* unabated by the adjudication decision as well as without attracting res judicata because the adjudication decision enjoyed temporary but not perpetual finality: see *G-Pile Sistem Sdn Bhd v CMMC Sdn Bhd and Anor* [2021] MLJU 2694; [2021] 1 LNS 1727.

[40] We are nonetheless mindful that winding up proceeding is a draconian procedure which may result in irreparable damage to business and reputation but we think have to heed the legislative objective of the CIPAA to alleviate the financial woes prevalent in the Malaysian construction industry. The objective of the CIPAA is threefold as stated in the preamble thereto, viz:

(a) facilitate regular and timely payment;

(b) provide a mechanism for speedy dispute resolution through adjudication; and

(c) provide remedies for recovery of payment in the construction industry.

[41] We know that the respondent will possibly be amongst many unsecured creditors with a claim on the appellant's assets and there is no assurance that the adjudicated debt will be wholly recovered from the wound up appellant. That aside, there is also often a significance lapse of time between the appellant entering into liquidation and the making of payment to the creditors by the liquidator. This is the commercial choice of the respondent, probably of last resort because the other enforcement remedies had been pursued without fruition. On the other hand, we have also duly considered and find that if the appellant is wound up, the appellant through the liquidator may still recover from the respondent should the appellant ultimately succeed instead in the ongoing arbitration proceeding between them.

[42] In the premises, we are, with respect, constrained to hold that the decisions in *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* and *Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd* relied upon by the appellant were erroneously made. Furthermore, as to the Singapore case of *Lim Poh Yeoh v TS Ong Construction Pte Ltd* which has been later considered in *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] SGCA 61 (CA), we find that they are both distinguishable because of the absence of the equivalent s 31(2) of the CIPAA in the Singapore Building and Construction Security of Payment Act 2004. The other Singapore case of *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* is plainly distinguishable by reason that there is no subsisting adjudication decision involved in the winding up proceeding.

[43] Simply put, we hold that the court has the jurisdiction and power to wind up the appellant for failure to pay on the decision. Hence, we find no appealable error in the learned judge's finding in paras [9] and [25] of the judgment that warrants our appellate intervention.

[44] On the specific facts and circumstances of this case, we find that the dispute over the respondent's unpaid payment in Interim Certificate No 4R has been adjudicated in the adjudication proceeding. The decision is however found in favour of the respondent notwithstanding the appellant's primary defence that was already encapsulated in the payment made by virtue of the settlement agreement made by them.

[45] However, after the decision was made on 4 February 2020, the appellant's architect issued a statement of final accounts dated 25 February 2020 but this statement, without agreement of the respondent, was subsequently further revised and reduced by the architect in Valuation Report No 37, Interim Certificate No 37 and revised statement of final accounts issued

on 13 August 2020. These statements of final accounts substantially reduced the amount owing by the appellant to the respondent.

[46] Moreover, the appellant added crossclaims of liquidated damages for late completion as well as damages for defective work done to resist payment to the respondent.

[47] Notwithstanding that it is unnecessary to consider the alleged disputes against the decision that are advanced by the appellant to oppose the winding up proceeding as alluded by us in paras [35] to [40] above, the learned judge went on to deal with the disputes raised by the appellant in the petition probably because the disputes were partly in addition to those raised earlier during the adjudication proceeding.

[48] In this respect, we find that the appellant must be precluded from advancing these disputes to oppose the petition because they were in fact raised by the appellant post the decision to support its setting aside and/or stay applications as well as to resist the respondent's enforcement application in relation to the decision. The appellant was unsuccessful including its subsequent appeal against the enforcement order. More pertinently, the appellant again raised and repeated the same in its interlocutory Fortuna injunction application in the winding up proceeding but which was also dismissed on 20 October 2022. Issue estoppel must hence be invoked here in our view.

[49] Nonetheless, we have reviewed the learned judge's judgment particularly paras [20] to [25] therein. We are satisfied that the appellant's disputes as advanced lack bona fide and are contrived merely to defeat the petition. In particular, we noted that the appellant's architect unilaterally revised previously certified variation orders after the making of the decision as well as the appellant's allegation for late completion surfaced in 2021 whilst the project was completed in December 2017. These are repugnant to common sense: see *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors*. Thus, we again find no appealable error in the learned judge's finding that justified our appellate intervention.

[50] Finally, the learned judge found in paras [27] to [33] of the judgment that the appellant is unable to pay its debts based on the financial information adduced before him. We have reviewed the same and also find there is no appealable error which warrants our appellate intervention. We specifically noted that the appellant is no longer operational as admitted during the judgment debtor summons proceeding. Furthermore, there were minimum sums only maintained by the appellant in its banks that are garnishable. It is plain to us that the appellant did not have cash flow solvency and that is

sufficient to justify winding up based on s 465(1)(e) of the CA see *Ahmad Zaki Sdn Bhd v Meor Hamzah (M) Sdn Bhd* [2016] MLJU 1391 and *SME Majujaya Sdn Bhd v Oon Brothers Electrical Trading Co Sdn Bhd* [2018] MLJU 899.

[51] In summary, we are satisfied that the appellant does not have a meritorious appeal.

CONCLUSION

[52] For the foregoing reasons, we therefore unanimously dismiss the appeal with agreed costs of RM10,000 subject to the allocator.

Appeal dismissed.

Reported by Ashok Kumar